
U.S. Department of Labor
Office of Administrative Law Judges
1111 20th Street, N.W.,
Washington, D.C. 20036

Case No. 85-ERA-41

In the Matter of

BONNIE J. PARKHURST,
Claimant

v.

K. COMSTOCK & COMPANY, INC.,
Employer

Thomas E. McClure, Esq.
For the Claimant

Bruce E. Heary, Esq.
Glenn Smith, Esq.
For the Employer

Before: GLENN ROBERT LAWRENCE
Administrative Law Judge

DECISION AND ORDER
Statement of the Case

Claimant, Bonnie Parkhurst, initiated the above entitled proceedings by filing a letter complaint with the Wage and Hour

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Division of the United States Department of Labor alleging discriminatory employment practices against L. K. Comstock, Inc. in violation of the Energy Reorganization Act 42 U.S.C. § 5851(a). Claimant contended that her June 14, 1985 layoff by Comstock was

unlawful retaliation for making safety and security charges against the project engineers, Sargent & Lundy for whom she had worked.

Pursuant to 29 CFR Part 24, the Secretary of Labor conducted an investigation into the violation alleged.

On September 18, 1985 the Department of Labor (DOL) notified Mrs. Parkhurst in writing that a fact-finding investigation had been conducted in accordance with 29 CFR Part 24 (ALJ Exhibit 1, in evidence) and in substance that the claim was without merit.

Mr. Parkhurst timely initiated an appeal from this ruling by telegram to this Office on September 24, 1985 (ALJ-1).

On October 4, 1985 the United States Nuclear Regulatory Commission issued a report essentially agreeing with DOL. (ALJ-2, in evidence).

A hearing was held before the undersigned on January 28, 1986 in Chicago, Illinois, with respect to the Claimant's charge against L. K. Comstock of unlawful retaliation. Pursuant to consent of counsel and leave of this office, the parties proposed findings of fact and conclusions of law were filed on March 11, 1986 with the time to issue the decision extended to April 17, 1986. The decision to follow is based on my observation of the witnesses; review of the entire record as well as the applicable law and regulations.

STIPULATED FACTS

The following facts were stipulated by both counsel or by counsel for the respective party, as indicated by the specific reference to the transcript:

1. The following exhibits appended to the transcript were admitted into evidence:

a. Employer Comstock's Exhibits A-1 through A-39 (TR 12, lines 21-25);

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b. Employer Comstock's Exhibits C-1 through C-5 (TR 13, lines 9-13);
c. Employer Comstock's Exhibit B (TR 14, line 6);
d. ALJ exhibit 1 (TR 17, lines 19-22);
e. ALJ exhibit 2 (TR 18, lines 16-19);
f. Claimant's exhibit 1 (TR 77)
g. Claimant's exhibit 2 (TR 86)

3. For her own reasons, Claimant did not work from March 7, 1985 until June 3, 1985 (TR 19, lines 18-22);

4. Claimant worked for Comstock from June 3, 1985 to June 14, 1985 at which time she was laid off (TR 19, lines 7-16);

5. Claimant was rehired by Comstock on September 4, 1985 (TR 19, line 10).

6. Claimant's hourly rates of pay were as follows:

a. January through March, 1985 -- $5.65 hr.
b. June 3, 1985 through June 14, 1985 -- $5.65 hr.
c. September 4, 1985 through December 31, 1985 -- $5.50 hr.
d. January 1, 1986 to date -- $6. 00 hr. (TR 20. lines 9-25)

7. Claimant was a Comstock employee (TR 22, line 1)

8. The deductions taken from Claimant's June 14, 1985 paycheck for unearned vacation, personal and sick days were proper and Claimant does not claim that these deductions are related in any way to her charge of discrimination or retaliation. (TR 153, lines 5-21; TR 153, lines 1-7).

Findings of Fact

1. Claimant Bonnie Parkhurst was hired by L. K. Comstock

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(the employer) on August 15, 1984 Supervisory controls were exercised by Sargent & Lundy (S & L), a subcontractor of Commonwealth Edison, the project owner, at the Braidwood Center a nuclear power site. (TR 21, lines 6-10; 21-25; TR 22, line 1).

2. Claimant was out of the service of Employer during the period March 7 through June 2, 1985. (TR. 19.)

3. On June 3, 1985, Claimant returned to work and continued to work through June 14, 1985. (TR 19).

4. Claimant was laid off effective immediately following June 14, 1985. (TR 19).

5. Claimant returned to work for Employer on September 4, 1985 and continues to work for Employer. (TR 19, 20).

6. During the periods January 1 through March 7, 1985 and June 3 through June 14, 1985 claimant earned $5.65 per hour. (TR 20.)

7. During the period September 4, 1985 through December 21, 1985 Claimant earned $5.50 per hour. (TR 20).

8. From January 1, 1986 until the date of the hearing, January 28, 1986, Claimant earned $6.00 per hour. (TR 20).

9. When Claimant worked for S & L, it largely supervised Claimant's day-to-day activities and controlled her work activities while the Employer paid Claimant's wages and viewed her as the Employer's employee. (TR 21-22).

10. Claimant was originally hired by Employer as a clerk- typist. (TR 49).

11. On September 3, 1985, after Claimant returned to employment from a layoff, her position changed to clerk. (TR 49, 85).

12. When Claimant was originally hired by Employer to work for S & L, she helped the leads at S & L with some of their catch up work and back work. (TR 49, 50).

13. In September, 1984, Claimant began working in S & L's

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mylar room. (TR 49, 50). In this capacity, Claimant was held responsible for the control and filing of approximately 16,000 mylar prints sent to the Braidwood site after bring filmed and processed in Chicago. (TR 50, 51).

14. The mylar prints for which Claimant wag held responsible were drawings used by engineers in the field to build the Braidwood nuclear power plant. (TR 51).

15. In September, 1984 when Claimant was assigned to S & L's mylars along with a number of engineering change notice (ECN) books. (TR 52).

16. In September 1984, the two mylar vaults in S & L's mylar room were so full that another vault was needed (TR 52) and the ECN books in the mylar room had an excessive amount of papers in them in light of the size of the books. (R. 52).

17. In September 1984, the S & L mylar room was approximately twenty five feet long and ten to twelve feet wide. (R. 53).

18. In September 1984, there was no fire extinguisher in the S & L mylar room. (TR 53).

19. Claimant was advised of her assignment in the mylar room by two S & L supervisors: James Stewart, her immediate supervisor in document control, and Chuck Reese, the supervisor of the document control department. (TR 54).

20. Although others worked with Claimant in the S & L mylar room, no one was supervised by Claimant. (Tr. 54-55).

21. In September 1984, the mylar room was easily accessible to the engineers despite efforts to keep the room secure. (TR 551).

22. In September 1984, there were no locks on the mylar's vaults, and thus, anyone in the mylar room would have access to the mylars by merely opening the drawers to the vault. (TR 55).

23. In September 1984 through January 31, 1985 the standard operating procedure was for mylars to be signed in and out by the engineers. (TR 55-56, 57).

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24. Because the sign-in procedure was not effective, claimant used a "computer kickout sheet" to record mylars requested by the engineers. (TR 56).

25. In the fall of 1984, Claimant discovered outdated mylars together with the revised mylars. (TR 57, 58). The outdated mylars were inconsistent with the revised mylars. (TR 59).

26. During the fall of 1984, the mylar room was so tiny and aisle space was so narrow that Claimant and co-workers had to wait for one another even to move from one corner of the room to the other. (TR 59). Claimant and her co-workers were surrounded by desks, mylar vaults, and an number of rows of book shelves. (TR 59).

27. In December 1984 or January 1985, Claimant reported problem, in the mylar room to James Stewart, her floor lead Marlene Metzen, and Chuck Reese. (TR 60). Both Stewart and Reese responded that they could not do anything about the mylar room problems at the time. (TR 60, 65, 67).

28. In December 1984 or January 1985, Claimant reported these problems to Ken Fuss, assistant field coordinator for S & L, (TR 65) and George Koladazzak (TR 66) (TR 67). She showed these men how the computer sheet she was using to inventory the mylars was not updated to reflect new revisions. (TR 66).

29. Ken Fuss told Claimant that she "has really shaken everyone up." (TR 66).

30. No immediate changes took place in the mylar room after Claimant waged these complaints. (TR 66-67).

31. On January 14, 1985, as part of a plant-wide program, Claimant met with Bill Gagnon, manager of Quality First, the Quality Control division of Commonwealth Edison. (TR 68). The interview took approximately two to two and one-half hours. (TR 69).

32. Claimant told Gagnon of all the problems she was experiencing with the mylars, her concern of having the updated mylars, her concern of having more mylars, as well as the potential fire hazard of the mylar room which had no fire extinguisher. (TR 69).

Claimant also mentioned to Gagnon that she had no cooperation from her superiors at S & L. (TR 69).

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Gagnon advised Claimant that there would be an investigation and that he would advise her of the outcome. (TR 70).

33. On February 1, 1985, S & L supervisors, Chuck Reese and Ann Muzzarelli, gave Claimant a reprimand and changed her job assignment from the mylar department to documentation. (TR 70, 71).

34. The size and condition of the mylar room as well the standard operating procedures therein remained substantially the same between September 1984 until February 3, 1985. (TR 70 71).

35. On February 3, 1985, the walls of the mylar room had been extended to enlarge the room (TR 73); the number of desks decreased from three to two (TR 74); another usable mylar vault was in the room (TR 74); a fire extinguisher was in the room (TR 74); the door to the mylar room was changed with the addition of a piece of glass, thereby preventing someone outside of the room from reaching inside the room to open the door (TR 74-76).

36. On February 17, 1985, Claimant wrote a letter to the Nuclear Regulatory Commission and to the Wage and Hour Division of the U.S. Department of Labor. (TR 76-78; Claimant's Exhibit No. 1).

37. Beginning on March 7, 1985, Claimant took time off from work due to her husband's illness after receiving permission from Ann Muzzarelli, Claimant's supervisor from S & L. (TR 79, 80).

38. In April, Frank Rowland, project manager of Employer, wrote Claimant and advised her that she had exhausted her vacation days and informed her that she could not take off work for her husband's illness only for her own. (TR 81, 82).

39. Claimant then obtained medical leave from her physician. (TR 82).

40. On Approximately May 31, 1985, Claimant contacted Rowland and advised him that she would be returning to work. (TR 82). Rowland advised Claimant to report to Joe Klena, project engineer, with Employer. (TR 82).

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41. While she was working for S & L, Claimant was paid time and one-half for overtime. (TR 83).

42. On June 3, 1985, when Claimant returned to work, she was assigned to the xerox room running copies working directly for Employer. (TR 83). She then started working a 40 hour work week. (TR 83).

43. On June 10, 1985, Joe Klena told Claimant and another employee that she was being laid off due to lack of work. (TR 83-84).

44. On August 22, 1985, Frank Rowland wrote Claimant and offered her a position as a clerk at $5.50 an hour (TR 156, TR 84, lines 17-22) in the xerox room. (Joint Exhibit A-17).

45. Although Claimant's job responsibilities were essentially the same ones she performed in June 1985, her job title was "clerk" rather than "clerk/typist". (TR 84-85).

46. Chuck Reese and Ann Muzzarelli knew that Claimant spoke with Mr. Gagnon with Quality First. (TR 94, 95).

47. When claimant was hired at S & L through Employer she was told to take orders from supervisors at S & L. (TR 100).

48. Claimant always received her paycheck, from Employer. (TR 100).

49. When Claimant was originally hired by Employer she was given policies and practices documentation from Employer. (TR 100).

50. Claimant was docked by Employer for days of personal and vacation days she took which had been authorized by Ann Muzzarelli. (TR 107).

51. Claimant received ,360.00 in unemployment compensation during the summer of 1985. (TR 109).

52. During the period of June 17 through September 2, 1985, Claimant lost 56 eight hour non-overtime days. (TR 115). Her non-overtime wage loss for this period is $2,531.20.

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53. During the period September 3 through December 31, 1985, when Employer was paying Claimant 15 cent per hour less than what she was previously making. Claimant worked 86 eight hour days. (TR 116). The difference in non-overtime pay Claimant would have earned had she continued to earn $5.65 per hour and what she actually earned during this period was $103.20. (TR 116).

54. When Claimant worked for S & L in the mylar room she averaged 15 hours per week in overtime.

55. During the period June 3 through December 31, 1985, had Claimant been working overtime 15 hours per week she would have worked 30 weeks of 15 hours overtime each plus two additional days of two hours of overtime each. (TR 117). Had Claimant been paid at a base rate of $5.65 per hour during that period, her overtime wages would have amounted to $3,779.85. (TR 118).

56. The problems discovered in the mylar room for which Claimant was reprimanded could have been created by others who had access to the mylar vaults. (TR 127).

57. When Claimant was working in the S & L mylar department approximately one-third of mylars were easier to track due to Claimant's efforts. (TR 128) The remaining two-thirds of the mylars became less easy to track. (TR 128).

58. In July of 1985, four clerk positions became available with Employer. (TR 182).

59. In July of 1985, Joseph Klena gave Claimant no consideration in being hired for one of the clerk positions. (TR 183).

60. On July 16, 1985, Virginia Tharp was hired as a clerk by Employer (TR 184).

61. As a clerk for Employer Virginia Tharp was a xerox operator, the same functional position Claimant held in June 1985 and from September 1985 to the date of hearing. (TR. 31, 38).

62. Laid off employees of Employer are ordinarily called back to work when the position they left becomes available. (TR at 32).

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63. Virginia Tharp was hired as a permanent employee and not as a summer hire. (TR 185).

64. Employer through Frank Rowlan maintained that during Claimant's layoff in the summer of 1985, permanent positions in the xerox room were not filled instead only temporary summer positions were hired. (TR 37).

65. Claimant too had taken personal days and vacation days which had not yet accrued. Frank Rowlan took the position that when she returned to work she would earn them so that Employer could "balance the books." (TR 40, 151).

66. Frank Rowlan acknowledged becoming aware of Claimant's complaint to Quality First in early March 1985. (TR 48, 147).

67. Of the 1100 employees on the Braidwood project site approximately 50 work for S & L. (TR 143, 161).

68. Employer's responsibility at the Braidwood site is the electrical installation of the plant. (TR 143).

69. S & L acts as the architect/engineer at the Braidwood site. (TR 144).

70. The Employer through Frank Rowlan claimed that Claimant was not offered a position in the xerox room in July 1985 because Rowlan "didn't figure she would . . . be interested in that demotion." (TR 157). In August 1985, Rowlan claims that he offered her a position because she was going to be a good guy." (TR 158).

71. Employer through Frank Rowlan claims that Commonwealth Edison imposes requirements on Employer as to the exact number of employees it can have in each department. (TR 159).

72. Although Employer has no formal policy regarding the recall of laid off employees, Employer through Frank Rowlan, maintained an informal practice of contacting laid off good employees if they are interested in returning to work. (TR 160).

73. Employer's employees who work for S & L must follow Employer's personnel policy. (TR 164).

Discussion

The employer's counsel presented his case skillfully. However notwithstanding the employers protestations it seems apparent to this observer that the claimant's criticism of unsafe nuclear conditions triggered the impermissible discriminary conduct on the part of the employer. (TR 179). Claimant is now relegated to working as a xerox operator though she appears quite bright a able to perform more challenging work.

Raised by the employer are a number of points. They will be discussed in turn. Firstly it argues *Citing Brown & Rout, Inc. v. Donovan*, 747 F.2d, 1020 (5th Circuit 1984), that the February 1, 1985 reprimand and assignment were not violations of the whistle blower act as the employee had not gone outside the company to make an official complaint but merely complained to a quality control unit within the company. In the Brown case, the Circuit disagreed with the Labor Department that a discriminatory act steming from a quality control complaint was actionable under the statute. However in the 9th circuit case of *Mackowiak v. University Nuclear System, Inc*. 739 F.2d 1159, decided the same year, as Brown the Court of Appeals sided with the Labor Department to the extent that it held that "every action of quality control inspectors are "in affect" part of a NRC proceedings and were covered by the act . . . "In other words, contractors regulated by § 5851 may not discharge quality control inspectors because they do their job too well".

The testimony of the employee here establishes that she functioned as a type of quality inspector and it was this activity that caused the discriminatory acts of the employers. From another standpoint, it is concluded that her very complaints to the quality inspectors is comtemplated by the act. Without such protection the nuclear whistle blower provisions would be rendered ineffectual.

As discussed in the findings, the attempt to restrict liability to Sargent & Lundy would not appear justified. The indicia of control by L. K. Comstocks and Company was evident in this record and they were in fact Claimant's employer. The cite to *Whiteheard v. Safeway Steel Products, Inc*. 497 A.2d 803 (May 1985) is of course noncontrolling. In any event that case focuses on a temporary employment situation which is not the case here. Listening to the employers witnesses, persuades they

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could and most likely did assert considerable behind the scenes control over claimant.

The employer is correct in its contention that the claim for personal and vacation days was waived (TR 153). Further the unemployment compensation, given the particular facts of this case, should be deducted from any award.

CONCLUSIONS OF LAW

1. A prima facie case of retaliatory discharge violative of the "whistle blower" protection statute of the Energy Reorganization Act of 1974 42 U.S.C. Section 5851 was established by substantial evidence.

2. A discrimination claim under Section 5851 must include proof: (1) that the party charged with discrimination is an employer subject to the Act; that the complaining employee was discharged or otherwise discriminated against with respect to his compensation, terms, conditions or privileges of employment; and (3) that the alleged discrimination arose because the employee participated in a Nuclear Regulatory Commission proceeding. *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984). See the aval motive test discussed in *Mt. Healy City School District v. Doyle* 429 U.S. 274 (1977).

3. An employer subject to the Act includes "a contractor or a subcontractor of a Commission licensee." 42 U.S.C. Section 5851(a). The Claimant was employed by L. K. Comstock and S & L both of which were contractors or subcontractors of a Commission licensee, Commonwealth Edison. (TR 21, 68).

4. The Claimant was discharged or discriminated against with respect to terms of employment. On February 1, 1985, she was reprimanded by S & L supervisors and her job assignment was changed. (TR 70, 76). Beginning on March 7, 1985 Claimant took time off of work due to husband's illness after receiving permission from S & L (TR 79,

80), but in April the Employer informed her that she could no longer take the time-off. (TR 81, 82). When Claimant returned to work on June 3, 1985 she was given a new assignment without overtime (TR 82). On June 10, 1985, she was laid off allegedly due to lack of work. (TR 83, 84). In July, 1985 four clerk positions became available.

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Virginia Tharp was hired as a permanent employee. (TR 185). The Claimant was given no consideration for one of the new positions, (TR 183), although employees are ordinarily called back to work when the position they left becomes available. (TR 32). She was not recalled to work until September, 1985. (TR 84). This course of conduct was clearly discriminatory and deprived Claimant of wages and other benefit, or employment she would have enjoyed.

5. Claimant was discriminated against because she participated in an NRC related proceeding. only participation in such a proceeding is required to establish a prima facie case; a claimant is not required to show that she disclosed unique evidence or evidence that the employer attempted to hide in order to make out a cage of discrimination under the Act. *DeFord v. Secretary of Labor*, 700 F.2d 281, 286 (6th Cir. 1983). Internal safety and quality control complaints trigger the protections of the "whistle blower" provision of the Act. *Mackowiak*, 735 F.2d at 1163.

6. The presence or absence of retaliatory motive is provable by circumstantial evidence even if there is testimony to the contrary by witnesses who perceive lack of such improper motive. *Mackowiak*, 735 F.2d at 1172.

7. After relating numerous safety problems to her superiors on two separate occasions (TR 60-67), and seeing no changes take place (TR 66, 67), Claimant met with Quality First, the Quality Control division of Commonwealth Edison concerning the safety hazards. (TR 68, 69). Approximately 2 weeks later her S & L supervisors reprimanded her and changed her job assignment from the mylar department to documentation. (TR 70, 71). Two days later the hazards of which she had complained were corrected. (TR 73-76). Shortly after Claimant registered her internal complaint she was reprimanded and discriminated against based on the terms and conditions of employment.

8. Under Title VII interrelated operations will be held jointly liable for discriminatory treatment of an employee. In the context of Title VII liberal construction is to be given to the definition of "Employer" so as to carry out the purposes of Congress to eliminate discrimintation. *Baker v. Stuart Broadcasting Co.*, 560 F.2d 389, 391 (8th (Cir. 1977). The most important requirement under 42 U.S.C. Section 2000e(b) in defining the term employer is that there is sufficient indicia

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of an interrelationhip between the immediate corporate employer and the affiliated corporation to justify the belief on the part of the aggrieved employee that the affiliated corporation is jointly responsible for the actions of the immediate employer. *Armbruster v. Quinn*, 711 F.2d 1332, 1337 (6th Cir. 1983). When such a degree of interrelatedness is present the departure from the normal separate existence between entities is adequate reason to view the conduct of one party as that of both. *Armbruster*, 711 F.2d at 1337.

9. For guidance in testing the degree of interrelationship, the courts will apply a four part test formulated by the NLRB: The degree of (1) interrelatedness of operation, (2) common management (3) centralized control of labor relations and (4) common ownership. *Armbruster*, 711 F.2d at 1337; *Baker* 560 F.2d at 392. While each factor is indicative of interrelatedness and while control over the elements of labor relations is a central concern, the presence of any single factor in the Title VII context is not conclusive. *Armbruster*, 711 F.2d at 1337. All four criteria need not be present in all cases and even when no evidence of common control of labor relations policy is presented the circumstances may be such that the Title VII single employer doctrine is applicable. *Armbruster*, 711 F.2d at 1338. For example, in *EEOC v. McLemore Food Stores, Inc.*, 25 F.E.P. 1356 (W.D. Tenn. 1977) three corporations were held to be a single enterprise where there was cooperative hiring of new employees and a practice of loaning and transferring employees.

10. The game rationale should be applied in the context of the Energy Reorganization Act.

11. The Employer and S & L should be viewed as a single Employer. Claimant was hired by the Employer but worked for S & L. (TR 21). S & L supervised Claimant's day-to-day activities and controlled her work scheduled while the Employer paid Claimant's wages. (TR 21, 22). S & L supervisors advised her of her assignment to the mylar room (TR 54), and reprimanded her and changed her job assignment from the mylar department to documentation.[1] (TR 70, 71). S & L initially approved a leave of absence (TR 79, 80), although the Employer subsequently informed the Claimant that she could not take the time off. (TR 81, 82). On June 3, 1985, when Claimant returned to work she worked directly for the Employer and one week later was laid off

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by the Employer. (TR 83, 84).

12. There was obviously joint control of personnel and a "loaning and transferring" of the employee by S & L and Comstock. In addition, both parties retaliated against the employee after her meeting with the quality control division. Accordingly, Claimant has established a prima facie case against the Employer.

13. The reasons offered by Employer explaining why the Claimant was disciplined, transferred, laid off and not recalled at the first opportunity and otherwise discriminated against in her employment are merely pretexts for the discrimination.

14. Claimant was allegedly reprimanded and reassigned because of the quality of her work. (Exhibits A-1, A-2, A-3). However, the problems complained of in the written warning were the result of lack of space and unlimited access by other employees - problems which the Claimant had repeatedly complained of and which were corrected after she was transferred from the department. (TR 73-75). In addition, there were two fellow employees assigned to the mylar department who also would have been responsible for the existing problems yet they were not disciplined or reassigned (TR 128) even though the efforts of the Claimant improved the department while those of the others worsened the situation. (TR 127, 128). The imposition or lesser punishment was pretextual. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973); *Worthy v. United Steel Corp.*, 616 F.2d 698, 702 (3d Cir. 1980).

15. The Employer also suggested conflicting reasons why the Claimant was not rehired until September, 1985. Joseph Klena testified that he gave the Claimant no consideration in being hired for one of the clerk position openings in July, 1985. (TR 183). They were permanent employee positions. (TR 185). Frank Rowlan stated that permanent positions in the xerox rooms were not filled in July, 1985; only temporary summer positions were filled. (TR 37). Rowlan claimed that he did not offer the Claimant a position in July, 1985 because he did not think she would be interested but that he offered her a position a month later because he was being "a good guy". (TR 157, 158).

16. Inconsistencies in an employer's articulation of legitimate nondiscriminatory reasons for its actions establish

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that those purported reasons are pretextual. See *Locke v. Kansas City Power & Light Co.*, 660 F.2d 359 366 (8th Cir. 1981); *Williams v. Trans World Airlines*, 660 F.2d 1267, 1272 (8th Cir. 1981); *Herrington v. Abington School District*, 19 Fair Empl. Prac. Cas. 1096, 1098 (E.D. Pa. 1979).

17. The Employer's failure to articulate these reasons for failure to reinstate the Claimant earlier until the time of trial demonstrates that the reasons were pretextual. See, *e.g.*, *Williams v. Trans World Airlines, Inc.*; *Locke v. Kansas City Power & Light Co.*; *Herrington v. Abington School District*; *Foster v. Simon*, 467 F. Supp. 533, 537 (W.D. N.C. 1979); *Johnson v. University of Pittsburgh*, 359 F. Supp. 1002, 1010 (W.D. Pa. 1973).

18. Claimant is entitled to backpay as follows:

(a) A total of 56 eight hour non-over- time days during the period of June 17 through September 2, 1985, (TR 115).

$2,531.20

(b) A total of 86 eight hour days during the period June 17 through September 2, 1985, (TR 116); when the employer was paying claimant 15 cent per hour less than she was previously making.

103.20

(c) Overtime pay during the period June 3 through December 31, 1985 totaling $3,779.85 for 15 hours per week for 30 weeks plus two additional days of two hours of overtime. (TR. 117, 118).

3,779.85

Total

6,414.25

19. The Claimant's receipt of ,360.00 in unemployment compensation during the summer of 1985 (TR 109) should be deducted from her backpay award.

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- 1,360.00

Net owing

5,054.25

20. The Claimant is entitled to reasonable attorney's fees. Section 5851(e)(2) authorizes this office to "award costs of litigation (including reasonable attorney and expert witness fees) to any party." Therefore, plantiff's counsel should be granted leave to file a petition for reasonable costs, including attorney's fees.

ORDER

1. The Employer L. K. Comstock and Company shall pay forthwith to the employee the sum of $5,054.25 together with interest at highest legal rate dating from December 31, 1985.

2. Claimant's attorney shall submit on notice an itemized petition for an attorneys fee within 10 days of receipt of this order.

GLENN ROBERT LAWRENCE
Administrative Law Judge

Dated: APR 7 1986
Washington, D.C.

[ENDNOTES]

[1] The employer now seems to admit the validity of the reprimand is in doubt (TR 176, line 9, 177 line 8 & 9).